

In the High Court of Fiji at Suva

Civil Jurisdiction

HBC Action No. 306 of 2013

BETWEEN: Fiji Development Bank

Plaintiff

AND: Chandra Kala Kumar

First defendant

Ajesh Kumar

Second defendant

Appearances: Mr N.Lajendra for the plaintiff

Mr E.Koroi for the defendants

Date of hearing : 29th November, 2013

JUDGMENT

1. This is an originating summons filed by the plaintiff seeking the following orders:
 - i. Delivery by the defendants and/or their servants and/or agents to the plaintiff of vacant possession of the property in certificate of title no. 18485, Lot 6 on DP no. 4612 Uluiraluve and Maliwaira (part of), in the district of Raralevu and island of Viti Levu, having an area of one rood thirty two perches and four tenths of a perch situated at Lot 6, Vusuya Road, Raralevu, outside Nausori Town together with the improvements thereon.
 - ii. An injunction restraining the defendants, their servants or agents from interfering with the improvements on the said property in any way so as to deplete its value.
2. In an affidavit in support of the originating summons, Litia Lomalagi, Team Leader of the plaintiff states as follows:
 - a) The defendants are the registered proprietors of the property in CT no. 18485.
 - b) By mortgage registration no.588580 dated 8 June,2006, made between the plaintiff and the defendants, the property was charged to secure repayment to the plaintiff of

- all loans, advances, charges, interest and other banking accommodation made by the plaintiff to the first defendant.
- c) The details of the loan advanced to the first defendant are set out in the plaintiff's letter to the first defendant dated 31st March, 2006, attached.
 - d) In consideration for the loan facility, the plaintiff took a third party first mortgage over CT 18485 with the improvements thereon and an adequate all risk insurance cover over the property.
 - e) On 23rd May, 2006, the plaintiff took an additional security of a personal guarantee from the second defendant on 23 May, 2006, for the total liability.
 - f) The first defendant had agreed to pay interest, charges and fees on the loan facility.
 - g) The first defendant's loan account with the plaintiff fell in arrears.
 - h) On 1 November 2010, the plaintiff wrote to the first defendant requesting her to clear the arrears. Thereafter, further reminders were issued to the first defendant. On 27th October, 2011, a formal demand was sent to the first defendant. This was followed on by a formal demand to the defendants on 27th January, 2012, under the mortgage for payment of the full outstanding account within 30 days.
 - i) Since there was no response from the defendants, the plaintiff exercised its powers under the mortgage and called for tenders for the sale of the mortgaged property.
 - j) On 15th May, 2013, the plaintiff wrote to the first defendant advising her that it has received an offer to purchase the mortgaged property. The first defendant was advised that in order to retain ownership of the property, she may exercise her equitable right of redemption by paying the total debt outstanding within 14 days.
 - k) On 15th May 2013, the plaintiff issued a letter to the successful tenderer. On 2nd July, 2013, the plaintiff and the successful tenderer entered into a sale and purchase agreement.
 - l) The plaintiff wrote to the first defendant on 8 July, 2013, and both defendants on 26th August 2013, requesting them to deliver vacant possession of the mortgaged property within 30 days, failing which, eviction proceedings will be taken against them. The defendants failed to deliver vacant possession.
 - m) The mortgage document provides that it "*shall be lawful for the mortgagee at any time and from time to time without giving to the mortgagor any notice to do all or any of the following: a) To enter upon and take possession and/or enter into receipt of the rents.*"

5.4. The rights of the mortgagee to enter possession are reinforced in section 75 of the Property Law Act (Cap 130). This reads:

A mortgagee, upon default in payment of the mortgage money or any part thereof, may enter into possession of the mortgaged land by receiving the rents and profits thereof or may distrain upon the occupier or tenant of the said land for the rent then due.

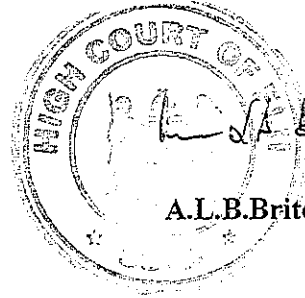
- 5.5. In the circumstances, I make order that the defendants deliver to the plaintiff vacant possession of all the property comprised in CT 18485 .
- 5.6. The plaintiff sought an injunction restraining the defendants from interfering with the improvements on the property. On 14th November, 2013, I granted the injunction for a period of two weeks. Thereafter, on 27th November, 2013, I extended the injunction until final determination of this matter.
- 5.7. The defendants have not denied the corresponding averment in the affidavit in support as regards the improvements on the property, except to say that they have no place to go.
- 5.8. In my judgment, the plaintiff is entitled to the improvements on the property. I issue injunction restraining the defendants from interfering with the improvements on the property in any way so as to deplete its value.

6. Orders

- a) I order that the defendants deliver to the plaintiff vacant possession of all that property comprised and described in certificate of title no. 18485, Lot 6 on , DP no. 4612 Uluiraluve and Maliwaira (part of), in the district of Raralevu and island of Viti Levu, having an area of one rood thirty two perches and four tenths of a perch situated at Lot 6, Vusuya Road, Raralevu, outside Nausori Town together with the improvements thereon.
- b) The execution of the orders for vacant possession is stayed for two weeks to give the defendants time to relocate.
- c) I issue an injunction restraining the defendants, their servants or agents from interfering with the improvements on the property, in any way so as to deplete its value.

d) The defendants shall pay the plaintiff costs in a sum of \$ 1500 summarily assessed.

2nd May, 2014



A.L.B. Brito-Mutunayagam
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Judge